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No. 93-1000

SUPREME COURT, U.S.
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In The

Supreme Court of the United States

October Term, 1993

THE TERMINIX INTERNATIONAL COMPANY
LIMITED PARTNERSHIP and
ALLIED-BRUCE TERMINIX COMPANIES, INC.,

Petitioners,

v.

MARK JACKSON and LAURIE JACKSON,

Respondents.

On Petition For A Writ Of Certiorari To The Supreme Court Of Alabama

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Alabama Supreme Court correctly held that Section 2 of the Federal Arbitration Act, 9 U.S.C. § 2, does not apply to contracts, the performance of which does not involve interstate commerce to such a degree that a reasonable person must have "contemplated substantial interstate activity" at the time of the contract?

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Respondents Mark Jackson and Laurie Jackson hereby submit their Brief in Opposition to the Petition for a Writ of Certiorari to the Supreme Court of Alabama filed by Petitioners. For the reasons set forth herein, respondents urge the Court to deny the Petition for a Writ of Certiorari.

We note preliminarily that this petition is one of three that have been filed from several contemporaneous decisions of the Alabama Supreme Court involving the scope of the "involving commerce" language contained in section 2 of the Federal Arbitration Act, 9 U.S.C. § 2. *Home*

Buyers Warranty Corp. II v. Lopez, NO. 93-995; *Allied-Bruce Terminix Cos. v. Dobson*, No. 93-1001. Although this Brief in Opposition is being filed prior to the opposition briefs in the other two cases, we respectfully suggest that the Court schedule all three petitions for the same conference, given the similarity of issues. Indeed, the petition in this case merely incorporates by reference the substantive arguments for granting review which were made in the petition filed in *Allied-Bruce Terminix Cos. v. Dobson, supra*. And since the opposition briefs in the other two cases will be filed later this month, simultaneous consideration of all three petitions will not unduly delay consideration of this petition.

STATEMENT OF THE CASE

The salient facts in this case are as follows. In essence, when respondents, the Jacksons, bought a home in Montgomery, Alabama, they also acquired rights under a termite protection plan from the previous owners with their offices located in Montgomery, Alabama. (C.R. 1-3; 35). The purpose in the plan was to provide pest control services at the respondents' home in Montgomery Alabama. When the Jacksons discovered termite damage in their home was far more extensive than petitioners had previously represented, they filed a Complaint in the Montgomery County Circuit Court. (C.R. 1-6). Some seven months later the petitioners filed a Motion to Compel Arbitration and Stay Litigation. (C.R. 31-34). During said seven months the petitioners filed requests for admissions, interrogatories, requests for production of documents, and took two depositions totaling over 100

pages. The plaintiffs, during that period of time, deposed three individuals consisting of over 300 pages. (Cert. Pet. App. 7a). The trial court held that the pleadings and evidence before it did not indicate a "sufficient nexus" to bring it within the FAA. (Cert. Pet. App. 6a). It is to be noted that the petitioners did not present any evidence whatsoever evidencing interstate commerce in support of their Motion to Compel Arbitration or in the hearing held thereon.[1]

The Alabama Supreme Court affirmed, finding that the performance of the contract "did not involve interstate commerce to such a degree that a reasonable person must have contemplated substantial interstate activity" when they entered into the same. (Cert. Pet. App. 4a).

Several factual assertions in the petition warrant a brief response. The petitioner states at page 3 of his Certiorari Petition that "the Supreme Court of Alabama held that the FAA did not apply to a contract containing an arbitration agreement because, notwithstanding the

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[1] As is stated by Petitioners at page 4 at f. 3, the trial court held in the alternative that petitioners had waived their right to arbitration based upon the "totality of the circumstances" in that they acted inconsistent with the arbitration right by waiting 7 months after the complaint was served before filing their Motion to Compel Arbitration and Stay Litigation. During said 7 months the certified record in the court below indicates that the petitioners filed Request for admissions, Interrogatories, Request for Production of Documents, as well as deposing two people. Further, during this period of time, the respondents took several depositions consisting of over 300 pages. *See, S&H Contractors, Inc. v. A.J. Taft Coal Co.*, 906 F.2d 1507 (11th Cir. 1990).

contract's actual nexus with interstate commerce, the parties had not *'contemplated . . . substantial interstate activity.'* Pet. App. 4a (citing *Metro Indus. Painting Corp. v. Terminal Constr. Co.*, 287 F.2d 382, 387 (2d Cir.), *cert. denied*, 368 U.S. 817 (1961)) (Lumbard, J., concurring) (emphasis added)." However, nowhere in the Opinion of the Supreme Court of Alabama is any language to the effect that the contract involved in this case had an "actual nexus with interstate commerce." In fact, there is no evidence of a nexus with interstate commerce contained in the certified record in the court below.

REASONS FOR DENYING THE WRIT

The petition should be denied because, contrary to the assertions made in the companion petition in *Allied-Bruce Terminix Cos. v. Dobson*, No. 93-1001, the decision below does not conflict with any decision of this Court, nor is there a conflict with the decisions of other State Supreme Courts or Federal Appeals courts.

I. THE ALABAMA SUPREME COURT DID NOT ERRONEOUSLY CONSTRUE THE "INVOLVING COMMERCE" ELEMENT CONTAINED IN § 2 OF THE FEDERAL ARBITRATION ACT

The petition asserts that the Alabama Supreme Court erroneously construed the "involving commerce" element contained in Section 2 of the Federal Arbitration Act, a requirement which must be met in order for the provisions of that Act to bind private parties to a contract. Petitioners' claim essentially reduces to a contention that

the decision below conflicts with this Court's ruling in *Perry v. Thomas*, 482 U.S. 483 (1987).

The petitioner basically argues that the FAA is a statute "that embodies Congress' intent to provide for the enforcement of Arbitration agreements within the full reach of the commerce clause." *Id.* at 490. Therefore, the petitioners argue that the contracts at issue here must therefore "involve commerce" within the meaning of the Act. However, this is a misreading of *Perry*.

Perry involved a stockbroker's dispute over commissions paid in connection with the sale of certain stocks with a national stock brokerage firm that employed him. The issue was whether or not the Act trumped or pre-empted a state law that required he be given a judicial forum to resolve that conflict. The issue in *Perry* was not whether commissions on stocks "involve commerce," but was whether the Act pre-empted a state law as to what matters were and were not subject to arbitration. It is difficult to see how one could dispute the fact that transactions involving the sales of stock on national stock exchanges are somehow not in commerce.

Therefore, the quoted statement in *Perry* about Congress regulating within the full ambit of its commerce clause powers refers to Congress' exercise of its power to resolve what issues are arbitrable. *Perry* certainly did not stand for the proposition that Congress had, in fact, decided to subject every transaction and therefore every contract to the Act. It merely decided that if a transaction was, in fact, governed by the Act, then inconsistent State law was pre-empted.

The issue presented here, unlike that in *Perry*, is whether there is evidence which would allow our court to decide the particular transaction "involves commerce", such that the requirements of the Act could be invoked to compel arbitration.

As this Court recognized in *Bernhardt v. Polygraphic Company*, 350 U.S. 198 (1956), not every contract or transaction "involves commerce, and is therefore subject to the Act." The contract involved in this case does not evidence a "transaction involving commerce" or "commerce among the several states." It involves a resident of the State of Alabama purchasing a home and obtaining a termite bond on said home issued by a company with its office located in Montgomery, Alabama.[2] (C.R. 35).

Further, the petitioner's argument that the Alabama Supreme Court has adopted a "subjective standard" in determining whether the FAA applied is incorrect. The trial court was not presented with any evidence whatsoever evidencing a "transaction involving commerce" or "commerce among the several states". Therefore, the Alabama Supreme Court used an "objective" standard of whether or not the performance of the contract involved interstate commerce to such a degree that a reasonable person must have contemplated substantial interstate activity when they entered into the same (Cert. Pet. App. at 4a).

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[2] The specific language on the bond is: Terminix Service, P.O. Box 7028, Montgomery, AL 36107, 205-265-0233. (C.R. 35)

II. THE OPINION OF THE ALABAMA SUPREME COURT IS NOT IN CONFLICT WITH FEDERAL APPEALS COURTS

Petitioners also err in arguing that the decision below conflicts with various cases from federal appeals courts. This is not the case.

Basically there are two types of contracts where "commerce" has frequently been found: (1) construction contracts, where there are building materials and other items, as well as employees, moving in interstate commerce. *Pathman Constr. Co. v. Knox County Hosp. Ass'n*, 326 N.E.2d 844 (Ind. App. 1975); *Burke County Pub. Schools Bd. of Educ. v. Shaver Partnership*, 303 N.C. 408, 279 S.E.2d 816 (N.C. 1981); *Del E. Webb Constr. v. Richardson Hosp. Auth.*, 823 F.2d 145 (5th Cir. 1987); and, (2) personal service contracts where it is obvious that the individual would be performing some of the terms of said contract in interstate commerce. *Bennish v. North Carolina Dance Theater, Inc.*, 108 N.C. App. 42, 422 S.E.2d 335 (1992).

There is also a third category of cases cited by the petitioners which does not fall within the above two categories but clearly evidences "commerce". The case of *Snyder v. Smith*, 736 F.2d 409 (7th Cir. 1984), *cert. denied*, 469 U.S. 1037 (1985) involved a contract dispute between Illinois residents over property in Texas and *Foster v. Turley*, 808 F.2d 38 (10th Cir. 1986) involved a contract dispute over mining claims where the output of the mine plainly traveled in interstate commerce.

The Petitioners overstate and misstate the extent to which there is a conflict between federal cases on one side and state cases on the other. As a preliminary matter,

the petition mistakenly cites *Pathman Constr. Co., supra,* as a decision of the Indiana Supreme Court when in fact it is a ruling of the Indiana Court of Appeals. As to *Burke Co. Pub. Schools Bd. of Educ. v. Shaver Partnership, supra,* the North Carolina Supreme Court held that a contract for the construction of a school building between a multi-state architectural firm and local Indiana school boards contemplated substantial interstate activity so as to be governed by the FAA. In *Burke,* the Court was addressing whether or not "contemplation" could be found from the factual criteria of the case. In doing so, the Court stated:

> "We do not mean to suggest that where the contracting parties are merely located in different states or where other facts tending only to show diversity of citizenship are present, the contract must necessarily be found to contemplate substantial interstate activity so as to trigger the act's applicability. *Where, however, performance of the contract itself necessarily involved, so that the parties to the agreement must have contemplated substantial interstate activity the contract evidences a transaction involving commerce within the meaning of the Federal Arbitration Act." Burke County Public Schools Board v. Shaver,* 279 S.E.2d at 822 (1981). (Emphasis added).

Although the wording of the various cited decisions by the petitioners may vary to an extent, the petitioners are overstating the existence of any conflict.

Petitioners err in characterizing the decision below as requiring an inquiry into subjective intent, when a fair reading suggests that the contested "contemplated" language employed by the Alabama Supreme Court is in fact closer to the objective standard used in cases such as

Pathman, supra, and *Burke County, supra.* The Alabama Supreme Court stated: "The performance did not involve interstate commerce to such a degree that a reasonable person must have contemplated substantial interstate activity when they entered into the contract." *See, Allied-Bruce Terminix Cos. v. Dobson,* [Ms. 1920473, August 13, 1993] ___ So.2d ___ (Ala. 1993).

Moreover, even if the case were to be judged by the formulation of which petitioners seem to prefer, the result reached by the Alabama Supreme Court is entirely correct. The result reached by the Alabama Supreme Court would be the same however one worded the formulation. The contract in question involved a contract between a homeowner and an exterminator located in Montgomery, Alabama, to protect the homeowner from termites in his home. No evidence was presented to the trial court indicating that the contract evidenced a "transaction involving commerce" and the Motion to Compel Arbitration would have been denied were one to have used a "slight nexus" test or the "relating to" commerce language test that appear in some decisions.

Unlike large construction contracts where it is obvious that building materials and labor would be moving in interstate commerce (e.g. *Pathman, supra,* or *Burke, supra*) or even personal service contracts which indicate that the performer will travel to several states (*Bennish, supra*), a homeowner would have no objective expectation that "interstate commerce" was involved in a complaint to a local exterminator about a termite problem in his or her home.

CONCLUSION

For the reasons stated herein, the Petition for Writ of Certiorari to the Supreme Court of Alabama should be DENIED.

This the 8th day of February, 1994.

Respectfully submitted,

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for Respondents